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NASIR MANAF & ORS

v.

DATUK SERI PANGLIMA JOSEPH PAIRIN KITINGAN & ORS

B

HIGH COURT SABAH & SARAWAK, TAWAU
ABDUL RAHMAN SEBLI JC
[SUIT NO: T(22) 8-2008]
24 AUGUST 2009

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CIVIL PROCEDURE: *Striking out - Application for - Rules of the High Court 1980, O. 18 r. 19 - Failure to alienate lands to plaintiffs based on agreement with State Government - Whether there were valid and binding agreements between plaintiffs and defendants - Whether plaintiff had locus standi to maintain action - Whether plaintiff's claim*

D *disclosed no reasonable cause of action - Whether application allowed*

CONTRACT: *Agreement - Alienation of lands to plaintiffs - Whether a valid and binding contract was created between plaintiffs and State Government - Whether undertaking for benefit of limited class or general*

E *benefit of public - Whether justiciable - Contracts Act 1950, s. 26 - Whether plaintiffs had locus standi to maintain action - Whether plaintiffs' claim disclosed no reasonable cause of action*

This was the defendants' application to strike out the plaintiffs' writ of summons and statement of claim pursuant to O. 18 r. 19 of the

F Rules of the High Court 1980. The plaintiffs' cause of action was based on the 'Janji Kerajaan Berjaya' made by Datuk Harris Salleh of the Berjaya Party in 1979 when he was Chief Minister of Sabah. According to the plaintiffs, upon registration of their names at the land offices there were created contracts between them and the

G State Government for the alienation of 15 acres of land to each of them. The plaintiffs further contended that the defendants, as members of the subsequent State Cabinet, committed fraud when Parti Bersatu Sabah (PBS) which defeated the Berjaya Party in 1985 Government failed to alienate the lands to them and that for this

H failure the defendants were personally liable. The issues that arose were (i) whether 'Janji Kerajaan Berjaya' created valid and binding agreements between the plaintiffs and the defendants; (ii) was the promise made by Datuk Harris Salleh statutorily authorized and in line with the Sabah Land Ordinance (Cap 68) (the Land

I Ordinance); (iii) whether plaintiffs had *locus standi* to maintain this action.

Held (allowing the application):

(1) The new land alienation policy was strictly administrative in nature and did not constitute an order by the State Government to contract and there was in fact no contract signed. There was no factual situation the existence of which would entitle the plaintiffs to obtain from the court a remedy against the defendants: *Letang v. Cooper*. Aside from the fact that the 'Janji Kerajaan Berjaya' was a mere political promise which was 'not worth anything', there was nothing to support the plaintiffs' assertion that all applicants would as a matter of certainty be alienated 15 acres of State land each. (paras 13 & 17)

(2) In determining whether an undertaking by the government is one which constituted a legally binding contract which is enforceable in court or a mere statement of policy or a government obligation which is not justiciable, it is necessary to discover from the surrounding circumstances and the terms of the relevant provisions whether the undertaking is for the benefit of a limited class of the public or for the general benefit of the public at large. If it is for the benefit of the latter, it is not justiciable: *Iskandar Gayo & Ors v. Datuk Joseph Pairin Kitingan & Ors*. Although the alienation policy in the present case appealed to landless Sabahans, it was in fact for the benefit of the public at large because it also dealt with smallholders and the local and foreign corporations and not limited to landless Sabahans. In any event, the purported contract, if at all it could be called a contract, was not a commercial contract that was enforceable in a court of law. (paras 18, 19 & 20)

(3) A contract without consideration is void under s. 26 of the Contracts Act 1950. The essence of consideration is that the promisee has taken upon himself some kind of burden or detriment: *South East Asia Insurance Bhd v. Nasir Ibrahim*. In this case, the plaintiffs had provided none. As the pleadings stood, no consideration for the agreement was pleaded and no consideration could be discerned from the bundle of pleadings. The purported contracts were therefore void for want of consideration. Further, the declaration made by Datuk Harris Salleh was a declaration that was made unilaterally. It was therefore not enough to make a contract: *Guthrie Waugh v. Malaippan Mathucumaru*. (paras 21 & 22)

(4) The proper authority to alienate or to refuse alienation was the director as provided under s. 9 of the Land Ordinance, not the defendants. In the present case, the plaintiffs' claim if allowed would impinge on the express provisions of the Land rules (the Rules) which were made pursuant to s. 46 of the Land Ordinance. Under r. 2(1) of the Rules every application for State land must be in writing and must contain a sketch plan showing approximately the situation of the land applied for. In this case, the plaintiffs have not even identified the 15 acres that they claimed they were entitled to. Rule 2(4) of the rules further provided that even if the application fees had been paid it should not constitute an undertaking that the application would be approved. Having regard to these rules, the question that the plaintiffs had legitimate claims over the 15 acres of State land did not arise at all. The plaintiffs' action was merely to embarrass the defendants. (paras 23, 27 & 28)

(5) The plaintiffs were private persons and were bringing this action against the former Cabinet Ministers of the PBS Government for not honouring the promise made by the previous Berjaya Government led by Datuk Harris Salleh. If at all there was any person who could be held accountable to the plaintiffs it would be the State Government or the Director and not the defendants, least of all in their personal capacities. Despite the nature of their claim the plaintiffs chose not to sue the State Government nor the person who made the promise. (paras 30 & 32)

(6) In the present case, having regard to the pleaded facts and the affidavit evidence, the plaintiffs' claim disclosed no reasonable cause of action as against the first defendant and was scandalous, vexatious and an abuse of the court process as against the other defendants and ought to be struck out. (para 36)

Case(s) referred to:

Australian Woolen Mills v. Commonwealth of Australia [1956] 1 WLR 11 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bromley London Borough Council v. Greater London Council [1982] 1 All ER 129 ***(refd)***

Castro v. Murray [1911] 10 Ex 213 ***(refd)***

Cudgen Rutile (No 2) Pty Ltd & Anor v. Gordon William Wesley Chalk & Queensland Titanium Mines Pty Ltd [1975] 2 WLR 1 ***(refd)***

Dyson v. AG [1911] 1 KB 410 ***(refd)***
Guthrie Waugh v. Malaippan Mathucumaru [1970] 1 LNS 31 HC ***(refd)***
Iskandar Gayo & Ors v. Datuk Joseph Pairin Kitingan & Ors [1996] 3 CLJ 713 HC ***(refd)***
Letang v. Cooper [1965] 1 QB 232 ***(refd)***
Mid Kent Holdings PLC v. General Utilites PLC [1996] 3 All ER 132 ***(refd)***
Rederiak-Tiebolaget Amphitrite v. The King [1921] 3 KB 500 ***(refd)***
Regina v. Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association & Anor [1972] 2 QB 299 ***(refd)***
Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***
Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC ***(refd)***
South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***
Workon Sdn Bhd v. Director of Lands and Survey Sabah & 3 Other Interveners [1999] 1 LNS 31 HC ***(refd)***
Young v. Holloway [1895] P 87 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26
Land Ordinance (Cap 68) (Sabah), ss. 9, 46, 88
Rules of the High Court 1980, O. 18 r. 19

For the 1st defendant - Raymond Szetu (Alice Lim with him); M/s Dr Yee Tan & Assocs
For the 2nd, 2nd, 4th, 5th, 6th & 8th defendant - Datuk Douglas Primus; M/s Lee & Thong
For the plaintiffs - Francis Chee; M/s Chee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] This is the defendants' application to strike out the plaintiffs' writ of summons and statement of claim pursuant to O. 18 r. 19 of the Rules Of The High Court, 1980. The plaintiffs' claim, *inter alia*, is for the following declaratory reliefs:

(1) A declaration that the contract titled "Janji Kerajaan Berjaya" made by the State Government in 1979 constituted a valid agreement and offer and accepted by the plaintiff by their act of registering themselves at the respective land offices;

A (2) A declaration that binding contracts and agreements were constituted between the plaintiffs and the defendants who had inherited the State Government of Sabah and who were duty bound and delegated to honour the said contracts and agreements;

B (3) A declaration that whatever subsequent alienation to other party or parties of the said reserved lands which had been promised were null and void because of fraud committed by the defendants.

C (4) The defendants give 15 acres of land to each of the plaintiffs or pay damages to the plaintiffs in the sum of RM75,000 each for loss of rights and opportunity to own lands and for fraud.

The Pleaded Facts

D **[2]** After the 1976 State election in Sabah, the United Sabah National Organisation Party (USNO) was defeated and the Berjaya Party (Berjaya) came to power and formed the State Government. The leader of Berjaya, the late Tun Fuad Stephens was appointed E the Chief Minister of Sabah. However his tenure lasted for only 44 days when he was killed in a plane crash over Kota Kinabalu. He was succeeded by Datuk Mohd Harris Salleh (Datuk Harris Salleh).

F **[3]** Sometime in October 1977 the State Government under Datuk Harris Salleh adopted a "new land alienation policy and procedures" the details of which were published in an information booklet titled "Dasar Baru Pembahagian Tanah Kerajaan"

[4] On 4 December 1979, Datuk Harris Salleh on the occasion of G the signing ceremony of an agreement between the State Government and the Federal Land Development Authority made the following announcements in his speech (the FELDA speech):

(a) The State Government had reserved a total of 906,330 acres of H State land for landless Sabahans. These lands were to be alienated directly or through Government agencies at 15 acres to each landless Sabahans.

(b) Every landless Sabahan was entitled to 15 acres.

I **[5]** Sometime in 1982 the State Government printer published another information booklet titled "Kearah Masyarakat Petani Moden Kelas Menengah". This booklet incorporated the following:

(i) A front cover with the title "Kearah Masyarakat Petani Moden Kelas Menengah". A

(ii) A master plan of land development area and a list containing schemes in Bahasa Malaysia and English.

(iii) The text of the FELDA speech in Bahasa Malaysia and English. B

(iv) The back cover showing a photograph of Datuk Harris Salleh with a one paragraph declaration signed by him titled "Janji Kerajaan Berjaya". C

[6] According to the plaintiffs, following the FELDA speech they registered themselves as landless Sabahans at the Land offices in Lahad Datu and Tuaran.

[7] In 1985 it was Berjaya's turn to be defeated at the Sabah State election and a new government was formed by Parti Bersatu Sabah (PBS) under the leadership of the 1st defendant. The 1st defendant became the Chief Minister and remained so until 1994. In that year the Barisan National coalition was returned to power in Sabah and this was followed by the appointments of various Chief Ministers up until the present Chief Minister Datuk Seri Haji Musa Aman. D E

[8] The plaintiffs claim that since 1979 they had turned up at the land offices to enquire about their applications but were given the same old answers that they had to wait. It was only in December 2005 that they discovered that the lands which they had applied for were no longer available for alienation. They filed the present action in February 2008. F

The Claim G

[9] The plaintiffs' cause of action is based on the "Janji Kerajaan Berjaya" made by Datuk Harris Salleh in 1979 when he was Chief Minister of Sabah. The plaintiffs say that upon registration of their names at the land offices there were created contracts between them and the State Government for the alienation of 15 acres of land to each of them. This according to the plaintiffs was the stipulated mode of acceptance of the undertaking made by the State Government. The plaintiffs contend that these contracts, created in 1979, bind successive State Governments. H I

[10] The plaintiffs' further contention is that the defendants, as members of the subsequent State Cabinet, committed fraud when the PBS Government failed to alienate the lands to them and that for this failure the defendants are now personally liable.

[11] They complained that between 1986 and 1995 a total of 856,484 hectares of Sabah land were alienated to local companies which subsequently sold these lands to "giant" West Malaysian companies which has resulted in these companies now owning 85% of the oil palm plantations in Sabah. According to the plaintiffs the defendants in alienating these lands had fraudulently and recklessly ignored the existence of the valid contracts made between the State Government and the plaintiffs.

The Issues

[12] Although the defendants are sued in their personal capacities the reliefs sought by the plaintiffs call for the following issues to be considered, which I shall deal with in the following order.

Does The "Janji Kerajaan Berjaya" Create Valid And Binding Agreements Between The Plaintiffs And The Defendants?

[13] I must say at the outset that it does not. The new land alienation policy is strictly administrative in nature and does not constitute an offer by the State Government to contract and there was in fact no contract signed. There is no factual situation the existence of which will entitle the plaintiffs to obtain from the court a remedy against the defendants: *Letang v. Cooper* [1965] 1 QB 232.

[14] In this regard the judgment of the Privy Council in *Australian Woolen Mills v. Commonwealth of Australia* [1956] 1 WLR 11 is relevant. In that case the Australian Government set up a scheme of subsidies for the purchase of wool by manufacturers of woollen products during the war through a series of letters to various manufacturers. By 1948 the government stopped these subsidies for products bought after June 1948. The manufacturers contended that the letters constituted a series of offers which they accepted by purchasing the wool. The government pleaded that there were no contracts, that the basis of the scheme was not contractual but administrative. It was held that read as a whole the letters could not be treated as an offer or offers to contract as they contained a statement of policy. Lord Somervell of Harrow delivering the judgment of the court said at p. 19:

> Their Lordships are of opinion that these letters cannot be read as an offer or offers to contract. They contain a statement of policy. The "scheme" is to be administered by the Commission which is itself to determine the amount of the subsidy. No single phrase or provision may be decisive. The letters must be read as a whole. If the intention had been to provide for a series of contracts one would as between these parties have expected a form containing the provisions which, if disputes arose, would be construed and applied by the courts. The number of uncertain factors make it natural that the basis should be administrative.

[15] In *Bromley London Borough Council v. Greater London Council* [1982] 1 All ER 129 Lord Denning MR decided as follows at p. 135:

> In giving such weight to the manifesto, I think the majority of the GLC were under a complete misconception. A manifesto issued by a political party, in order to get votes is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. It may contain, and often does contain, promises or proposals that are quite unworkable or impossible of attainment … It seems to me that no party can or should claim a mandate and commitment for any one item in a long manifesto. When the party gets into power, it should consider any proposal or promise afresh, on its merits, without any feeling of being obliged to honour it or being committed to it. It should then consider what is best to do in the circumstances of the case and to do it if it is practicable and fair.

[16] Ten years earlier in *Regina v. Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association & Anor* [1972] 2 QB 299 the same learned judge succinctly remarked:

> And political promises are not worth anything.

[17] In the present case aside from the fact that the "Janji Kerajaan Berjaya" is a mere political promise which is "not worth anything" there is nothing in the FELDA speech to support the plaintiffs' assertion that all applicants would as a matter of certainty be alienated 15 acres of State land each. In the premises I cannot accede to the plaintiffs' contention that the promise is not a mere "puff" but a valid offer to landless Sabahans.

[18] In determining whether an undertaking by the Government is one which constituted a legally binding contract which is enforceable in court or a mere statement of policy or a government obligation which is not justiciable, it is necessary to discover from the surrounding circumstances and the terms of the relevant

provisions whether the undertaking is for the benefit of a limited class of the public or for the general benefit of the public at large. If it is for the benefit of the latter, it is not justiciable: *Iskander Gayo & Ors v. Datuk Joseph Pairin Kitingan & Ors* [1996] 3 CLJ 713.

[19] In my view although the alienation policy in the present case appeals to landless Sabahans it is in fact for the benefit of the public at large because it also deals with smallholders and the local and foreign corporations and not limited to landless Sabahans.

[20] In any event the purported contract, if at all it can be called a contract, is not a commercial contract that is enforceable in a court of law. In *Rederiak-Tiebolaget Amphitrite v. The King* [1921] 3 KB 500 it was held that the Government's undertaking was not enforceable in a court of law as it was not within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. This is what Rowlatt J said at p. 503:

> All I have got to say is whether there was an enforceable contract, and I am of the opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.

[21] Further, a contract without consideration is void under s. 26 of the Contracts Act 1950. The essence of consideration is that the promisee has taken upon himself some kind of burden or detriment: *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC. In this case the plaintiffs have provided none. As the pleadings stand, no consideration for the agreement was pleaded and no consideration could be discerned from the bundle of pleadings. The purported contracts are therefore void for want of consideration.

[22] The declaration made by Datuk Harris Salleh it will be noted was a declaration that was made unilaterally. It is therefore not enough to make a contract: *Guthrie Waugh v. Malaippan Mathucumaru* [1970] 1 LNS 31 HC.

Was The Promise Made By Datuk Harris Salleh Statutorily Authorized And In Line With The Sabah Land Ordinance (Cap 68) (The Land Ordinance)?

[23] The answer has to be in the negative. To begin with, the proper authority to alienate or to refuse alienation is the director as provided under s. 9 of the Land Ordinance, not the defendants. The action against the defendants is therefore wholly misconceived.

[24] In any event a formal resolution of the Cabinet is necessary to commit the State: *Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321 FC. See also *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah* [1994] 3 CLJ 229 HC. The facts in *Sa-Mal* are as follows. The Director of Lands and Survey (the director) offered to alienate 225 acres of land to Ko-Nelayan. The latter accepted the offer and paid 25% of the necessary premium payable in 1982. In 1984 the appellant applied to the director for 50 acres of the land already approved to Ko-Nelayan. The appellant solicited the help of the then Chief Minister, Datuk Harris Salleh. On 24 January 1994 the Secretary of Natural Resources, at the Chief Minister's office, notified the appellant by letter that their application had been approved.

[25] The appellant contended that this letter constituted an approval of their application and demanded that the director issue them the offer to alienate the 50 acres of land. In dismissing the appellant's claim Ian HC Chin J in his judgment said:

> Nobody, not even the Chief Minister could deprive Ko-Nelayan of the said land save with the consent of Ko-Nelayan or through the process of the law.

[26] In *Cudgen Rutile (No 2) Pty Ltd & Anor v. Gordon William Wesley Chalk & Queensland Titanium Mines Pty Ltd* [1975] 2 WLR 1 the Privy Council held that the Crown in the Commonwealth of Australia could not contract for the disposal of any interest in Crown lands except in accordance with the powers conferred by statute and, accordingly, where a statute prescribed a mode for the exercise of the statutory power, that mode had to be observed.

[27] In the present case the plaintiffs' claim if allowed will impinge on the express provisions of the Land rules (the rules) which were made pursuant to s. 46 of the Land Ordinance.

[28] Under r. 2(1) of the rules every application for State land must be in writing and must contain a sketch plan showing approximately the situation of the land applied for. In this case the plaintiffs have not even identified the 15 acres that they claim they are entitled to. Rule 2(4) of the rules further provides that even if the application fees had been paid it shall not constitute an undertaking that the application will be approved.

[29] Having regard to these rules the question that the plaintiffs have legitimate claims over the 15 acres of State land does not arise at all. It appears to me that the plaintiffs' action is merely to embarrass the defendants.

Do The Plaintiffs Have Locus Standi To Maintain This Action?

[30] The plaintiffs are private persons and are bringing this action against the former Cabinet Ministers of the PBS Government for not honouring the promise made by the previous Berjaya Government led by Datuk Harris Salleh. The judgment of the English Court in *Mid Kent Holdings PLC v. General Utilites PLC* [1996] 3 All ER 132 is instructive. In that case it was held that a private person had no right of action under the Fair Trading Act 1973 to bring proceedings to enforce undertakings given to the Secretary of State following a report by the Monopolies and Mergers Commission which identified the existence of a merger situation likely to operate against the public interest. Knox J said at p. 145:

> My reasons for rejecting the very wide *prima facie* construction are, first, that it would be extraordinary for Parliament to confer a remedy for breach of an undertaking on a far wider basis than the remedy for breach of an order. Secondly, it is not apparent what limit can properly be placed upon 'any person' if there is no limitation built into the expression by the latter half of s. 93A920. It could hardly have been Parliament's intention that the whole population of this country should be entitled to bring civil proceedings for failure to fulfill an undertaking. Thirdly, s. 92A can be given a sensible meaning if the latter part is allowed to control the expression 'any person', so that the subsection means that any person who would be empowered to bring civil proceedings in respect of a contravention of an obligation imposed by an order, will, where the obligation is imposed or assumed by the giving of an undertaking, be empowered to bring civil proceedings in respect of a failure to fulfill such obligation; but that other persons not

empowered to bring civil proceedings in breach of an order could not. That construction brings into line the provisions governing the right to bring civil proceedings in respect of a breach of an order with those governing the right to bring civil proceedings in respect of a failure to fulfill an undertaking, which seems by far the most probable intention to impute to Parliament.

[31] The plaintiffs' assertion is that the defendants, including the 1st defendant, as members of the PBS Government which took over power from the Berjaya Government committed fraud when they breached the alleged contracts by failing to alienate the 15 acres of land to them.

[32] The question is whether the defendants, in their capacities as ministers in the PBS Government were authorized by law to alienate State land under the Land Ordinance? The answer obviously is not because, as mentioned earlier the authority lies with the director. If at all there is any person who can be held accountable to the plaintiffs it would be the State Government or the director and not the defendants, least of all in their personal capacities. Despite the nature of their claim the plaintiffs chose not to sue the State Government nor the person who made the promise.

[33] In *Workon Sdn Bhd v. Director of Lands and Survey Sabah & 3 Other Interveners* [1999] 1 LNS 31 Richard Malanjum J (as he then was) refused an order of mandamus against the director. One of the grounds for refusal was that the director was not in a position to register the draft title under s. 88 of the Land Ordinance. The proper officer responsible for the registration of title was the Registrar but he was not made a party to the action.

[34] The applicable principles in an application of this nature are well settled. The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and should be exercised with the utmost caution: per Lord Diplock in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133 PC. A pleading should only be struck out if it is shown that it is on the face of it 'obviously unsustainable': *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC, or where the cause of action is bad and almost 'incontestably bad': *Dyson v. AG* [1911] 1 KB 410.

A **[35]** But if the pleading is so obviously frivolous that to advance it forward must be an abuse of the court process the claim will be struck out: *Young v. Holloway* [1895] P 87 and the court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation: *Castro v. Murray* [1911] 10
B Ex 213.

[36] In the present case, having regard to the pleaded facts and the affidavit evidence, I am of the view that the plaintiffs' claim discloses no reasonable cause of action as against the 1st defendant
C and is scandalous, vexatious and an abuse of the court process as against the other defendants and ought to be struck out.

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